United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

FOR DISTRIBUTION
DATE: April 3, 2009

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 25
(Heating Oil Partners d/b/a Alliance Exp.)
Case 1-CB-10950 536-2581-3384
536-2581-6733

This case was submitted for advice as to whether the Union violated its duty of fair representation when it declined to arbitrate the Charging Party's grievance after his death. We conclude that the Union did not violate Section 8(b)(1)(A) because its decision to withdraw the Charging Party's grievance from a scheduled arbitration was a rational administrative decision that fell within the wide range of reasonableness accorded the Union.

FACTS

In July 1999, the Employer terminated the Charging Party for allegedly engaging in insurance fraud while claiming workers compensation for an injury he sustained in 1998. Immediately after he was terminated, the Charging Party contacted the Union about grieving his discharge. Thereafter, the Union informed the Charging Party that his grievance would be held in abeyance pending resolution of the insurance fraud allegations pending at that time in civil court. The Massachusetts Industrial Accident Board (IAB) also deferred judgment on whether the Charging Party could continue to receive workers' compensation benefits until the insurance fraud allegations were resolved.

In September 2002, the Employer's insurer initiated a criminal complaint against the Charging Party. The Charging Party was acquitted of all criminal charges after a full trial in February 2006. A few weeks later, the Union met with the Charging Party and assured him that it would resume processing his grievance and, during subsequent conversations, stated that it was processing the grievance. In December 2006, the IAB concluded that the Charging Party was innocent of insurance fraud and that the Employer's termination of the Charging Party was therefore without merit.

In January 2008, the Charging Party filed an unfair labor practice charge against the Union for failing to process his grievance. However, the Charging Party withdrew his charge in March 2008 because of the Union's assurance that it was in contact with the Employer about settling his grievance. Shortly thereafter, the Union told the Charging Party that it needed an estimated backpay figure for further settlement talks with the Employer. The Charging Party's attorney sent the Union an estimated backpay figure of over $1,000,000.00. Subsequently, the Charging Party failed for several months to reach the Union by telephone despite persistent efforts to do so.

In October 2008, the Charging Party filed the instant charge against the Union. In December 2008, the Union told the Region that it had failed to secure a settlement with the Employer pursuant to the Charging Party's estimated backpay figure and had therefore decided to submit the grievance for arbitration. The Union confirmed that the arbitration of the Charging Party's grievance was scheduled for January 28, 2009.

The Charging Party died on January 22, 2009, and the Union withdrew the grievance from the scheduled arbitration, contending that its policy is to forego arbitrating a grievance after a grievant's death. Specifically, the Union asserts that it does not wish to jeopardize its business relationships with union employers, some of which already find it difficult to negotiate Union scale wages in collective-bargaining agreements for economic reasons, by processing grievances on behalf of deceased employees.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(A) because its decision to forego arbitration of a grievance on behalf of a deceased employee was a rational and practical administrative decision. The Region should therefore dismiss the instant charge, absent withdrawal.

A union that is the exclusive representative of bargaining unit employees complies with its duty of fair representation by avoiding arbitrary conduct and serving the interests of all employees in the unit without hostility or discrimination.[1] A union, however, is allowed a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its

[1] See Vaca v. Sipes, 386 U.S. 171, 177 (1967).

discretion."[2] Thus, a union may balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations.[3] If a union resolves conflicts between employees or groups of employees in a rational, honest, and nonarbitrary manner, its conduct may be lawful under Section 8(b)(l)(A) even if some employees are adversely affected by its decision.[4]

A union's goals and methods for reaching those goals "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made" is the touchstone in determining whether union conduct that has a disparate impact on one group of employees is unlawfully arbitrary.[5] This is because "not every act of disparate treatment is proscribed by Section 8(b)(1)(A) of the Act, but only those which, because motivated by hostile, invidious, irrelevant, or unfair considerations, may be characterized as arbitrary conduct."[6]

---

[2] Ford Motor Co. v. Huffman, 345 U.S. 330, 333-334, 338 (l953) (no breach of duty of fair representation by union's agreement to contract clause that granted enhanced seniority to one group of employees, thus causing layoffs in another group of employees). See also ALPA v. O'Neill, 499 U.S. 65, 78 (l99l) (breach of duty of fair representation only where union's conduct is "so far outside a wide range of reasonableness" as to be irrational).

[3] Ford Motor Co. v. Huffman, 345 U.S. at 338.

[4] See Humphrey v. Moore, 375 U.S. 335, 348-349 (l964) (no breach of duty of fair representation where union resolved seniority dispute in favor of one group of employees over another).

[5] ALPA v. O'Neill, 499 U.S. at 78 (union did not violate duty of fair representation even though strike settlement was allegedly worse than if union had merely ended the strike).

[6] Glass Bottle Blowers Assn. Local 149 (Anchor Hocking Corp.), 255 NLRB 715, 715 (1981). See, e.g., United States Postal Service, 240 NLRB 1198, 1199 (1979), enfd. in pertinent part sub nom. NLRB v. APWU, 618 F.2d 1249 (8th Cir. 1980) (union acted arbitrarily when a union officer took adverse action against an employee solely in order to impose official's personal view); General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.), 217 NLRB 616, 617 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976) (union acted

For instance, in Postal Workers (Postal Service),[7] a union lawfully excluded deceased employees from receiving payments from a negotiated settlement, which provided that unclaimed moneys would revert back to the employer. The ALJ, affirmed by the Board, found that the union's decision was a "reasonable and practical determination" that would maximize the potential payout to current and retired employees rather than risk losing unclaimed money.[8] Similarly, in Letter Carriers (Postal Service),[9] a union lawfully allocated retirees a lesser share of settlement proceeds than active employees. The Board determined that the union's decision was reasonable, particularly in light of the unsettled legal landscape regarding whether unions owe any duty of fair representation to retirees.[10] And in Kaiser Steel Corporation,[11] the Board held that the union lawfully limited settlement distributions to employees who remained employed in the bargaining unit at the time the grievances were settled.[12] In so doing, the Board reasoned that the union's decision "simply constituted one of a series of reasonable, practical administrative determinations regarding those employees entitled to share in the settlement proceeds," in circumstances where the parties could not accurately determine which employees were entitled to a settlement distribution.[13]

---

arbitrarily when it held an "unfair and invalid election" thereby depriving an employee of a contractual right).

[7] 345 NLRB 1282, 1282-1283 (2005).

[8] 345 NLRB at 1284-1285. The Board declined to rely on the ALJ's conclusion that a union owes no duty to a deceased employee, but rather found that the GC had failed to establish that the union had acted arbitrarily. Id. at 1282 n.1.

[9] 347 NLRB 289, 289-290 (2006).

[10] Id. No settlement proceeds were distributed to the estates of deceased retirees. Id. at 289 n.1.

[11] Steelworkers Local Union No. 2869 (Kaiser Steel Corp.), 239 NLRB 982, 982-983 (1978).

[12] Thus, employees who had retired, accepted supervisory positions, quit, been transferred out of the unit, or been discharged did not share in the settlement funds. 239 NLRB at 982.

[13] Id. at 982-983 & n.10, distinguishing District 65, Distributive Workers (Blume Associates), 214 NLRB 1059

Here, we conclude that the Union's decision to forego arbitrating the Charging Party's grievance because of his intervening death was a reasonable administrative decision and therefore was not violative of Section 8(b)(1)(A). The Union's proffered reason for that decision – preserving goodwill and maintaining productive business relations with union employers – is not arbitrary. First, assessments of resources and such business considerations are permissible when deciding whether to arbitrate grievances.[14] Second, despite the adverse impact of the Union's decision on the Charging Party and/or his estate, the Union's desire to maintain good business relations with union employers benefits all current unit employees. Finally, we note that despite the Union's frequent failure to return the Charging Party's phone calls, there is no indication that the Union's treatment of the Charging Party's grievance was perfunctory or in any other way violative of Section 8(b)(1)(A). Thus, at least within the Section 10(b) period, the Union began attempting to settle the Charging Party's grievance with the Employer in March 2008 and, within nine months, scheduled it for arbitration after the parties failed to reach a settlement on the substantial backpay figure provided by the Charging Party. In these circumstances, including the ambiguity of current Board law as to whether unions owe any duty of fair representation to

---

(1974) (union violated Section 8(b)(1)(A) when it distributed funds based solely on union activity). See also Crown Zellerbach Corp., 266 NLRB 1231, 1232 (1983) (union lawfully distributed bonus payments to employees who were actively employed on a certain date despite diminished payments to other employees; Board reasoned that union had acted consistently with past bargaining precedent and "out of a good-faith belief that the bonus proposal would benefit a significant majority of the unit employees").

[14] See Transit Union Division 822, 305 NLRB 946, 949 (1991) (ALJ, affirmed by the Board, concluded that unions may screen grievances and press only those that it concludes will justify the expense and time involved), citing Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972); Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971). See also Vaca v. Sipes, 386 U.S. at 191, 192 n.15 (individual employee does not have an absolute right to arbitrate grievance since union has "discretion to supervise the grievance machinery and to invoke arbitration;" Court favorably noted various unions' attempts to "keep the number of arbitrated grievances to a minimum").

deceased employees,[15] we conclude that the General Counsel would be unlikely to establish that the Union's decision to decline arbitrating the Charging Party's grievance because of his death was outside of the "wide range of reasonableness" accorded the Union.[16]

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

[15] See, e.g., Postal Workers (Postal Service), 345 NLRB at 1282 n.1.

[16] ALPA v. O'Neill, 499 U.S. at 67, citing Ford Motor Company v. Huffman, 345 U.S. at 338.